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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

Docket No. 130917809-4303-02

RIN: 0625-AA96

Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

ACTION: Final Rule.

SUMMARY: Enforcement and Compliance (formerly Import Administration), International Trade Administration, Department of Commerce (the Department), hereby publishes this Final Rule not to apply the previously withdrawn regulatory provisions governing targeted dumping in less-than-fair-value investigations. Following the Court of International Trade's decision in *Gold East (Jiangsu) Paper Co. v. United States*, 918 F. Supp. 2d 1317 (Ct. Int'l Trade 2013), the Department sought clarification of the status of the previously withdrawn targeted dumping regulations and input on whether to reinstate the regulations or to continue to treat them as withdrawn. The Department has considered the comments received and, as explained below, determines to continue not to apply the withdrawn targeted dumping regulations in less-than-fair-value investigations. Rather, the Department will continue to determine whether to apply an alternative comparison method as appropriate based upon the particular facts in each case.

DATES: This Final Rule is effective [INSERT date 30 days after publication in the Federal Register], and will apply to all less-than-fair-value investigations initiated on or after [INSERT

date 30 days after publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

Background

On October 1, 2013, the Department published its proposed rulemaking and request for comments regarding the Department's proposal not to apply the previously withdrawn regulatory provisions governing targeted dumping in less-than-fair-value investigations.¹ In light of the Court of International Trade's decision in *Gold East (Jiangsu) Paper Co. v. United States*, 918 F. Supp. 2d 1317 (Ct. Int'l Trade 2013) (*Gold East Paper*), in which the Court ordered the Department, on remand, to reconsider its final determination with respect to respondent Gold East and to apply the withdrawn regulations, the Department requested comments from parties to clarify the status of the previously withdrawn regulatory provisions as they applied to less-than-fair-value investigations and to determine whether to reinstate the regulations or to continue to treat them as withdrawn.² The Department also requested comment on the effect of the proposed rulemaking on recent modifications to the regulations concerning the calculation of the weighted-average dumping margins and assessment rates in certain antidumping proceedings.³

The Department received a number of comments on the Proposed Rule and has addressed those

¹ Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 78 FR 60240 (Oct. 1, 2013) (Proposed Rule).

² See 19 CFR 351.414(f) and (g); 19 CFR 351.301(d)(5) (2007) (regulatory provisions governing targeted dumping); see also Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930 (Dec. 10, 2008) (withdrawing the regulatory provisions governing targeted dumping) (2008 Withdrawal Notice).

³ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (Feb. 14, 2012) (2012 Final Modification).

comments below. The Proposed Rule, comments received, and this Final Rule can be accessed using the Federal eRulemaking portal at <http://www.regulations.gov> under Docket Number ITA-2013-0002.

After analyzing and carefully considering all of the comments the Department received in response to the Proposed Rule, the Department has adopted the approach proposed in the Proposed Rule. The Department will continue not to apply the withdrawn targeted dumping regulations in less-than-fair-value investigations based upon this Final Rule. As a result of this Final Rule, the Department is not modifying 19 CFR 351.414 or 19 CFR 351.301, the sections of the Department's regulations that previously included the withdrawn targeted dumping regulations.

As explained in the Proposed Rule, in less-than-fair-value investigations, the Department calculates dumping margins by one of two methods: (1) by comparing the weighted average of the normal values to the weighted average of the export prices (or constructed export prices) for comparable merchandise (known as the average-to-average method); or (2) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise (known as the transaction-to-transaction method). Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act). The statute also provides for an exception to these two comparison methods when the Department finds that there is a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and where such differences cannot be taken into account using one of the comparison methods described above. Section 777A(d)(1)(B) of the Act. When these criteria are satisfied, the Department may compare the weighted average of the normal values to the export price (or constructed export price) of

individual transactions for comparable merchandise (known as the average-to-transaction method).

Following the withdrawal of the regulations governing targeted dumping in 2008, the Department continued to develop its practice with respect to the use of an alternative comparison method on a case-by-case basis. The withdrawal allowed the Department to continue to refine its practice based upon its experiences and to analyze the comments received from parties in the course of proceedings based upon the facts on the record of a particular case. Last year, the Department introduced a differential pricing analysis to determine whether the use of an alternative comparison method is appropriate.⁴ In this Final Rule, the Department is adopting the approach from the Proposed Rule not to apply the previously withdrawn targeted dumping regulations in less-than-fair-value investigations, which will enable the Department to continue to develop its approach as it gains greater experience in this area.

Comments and Responses

The Department received nine comments on the Proposed Rule. Summaries of these comments are presented below and are grouped by the issues raised in the submissions. The Department's response follows immediately after each comment.

1. Effective Date

With respect to the effective date of the Proposed Rule, one commenter argued that the Department should reinstate the withdrawn targeted dumping regulations because it failed to properly withdraw the targeted dumping regulations in 2008 and now failed to provide a reasoned explanation for the withdrawal of the targeted dumping regulations in the Proposed

⁴ See, e.g., Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33,350 (June 4, 2013), and accompanying issues and decision memorandum at Comment 3 (Xanthan Gum from China).

Rule. If the Department subsequently decides to withdraw the targeted dumping regulations, the Department can provide notice of its intention not to apply the targeted dumping regulations and the effective date of that proposed rule should be 30 days after the adoption of a final regulation that addresses when and how the average-to-transaction comparison method will be used as an alternative comparison method.

Another commenter argued that new administrative proceedings are not affected by the status of the 2008 withdrawal of the targeted dumping regulations, because they are subject to the regulations as modified in the 2012 Final Modification, and, therefore, the Proposed Rule should be effective upon its final publication. One commenter argued that because there is good cause to waive the APA's 30-day waiting period for the effective date of a final rule, the effective date of the Proposed Rule should be December 10, 2008, the effective date of the Department's notice of withdrawal of the targeted dumping regulations. Another commenter argued that the effective date should be December 10, 2008, because a retroactive effective date is permissible in particular circumstances pursuant to the three-factor test established in *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed. Cir. 2005). Other commenters argued that because *Gold East Paper* was wrongly decided, the effective date of the withdrawn regulations should continue to be December 10, 2008. In the alternative, one commenter argued that the effective date of the withdrawn regulations should be no later than April 16, 2012, the effective date of the 2012 Final Modification, in which the Department promulgated a new regulation in 19 CFR 351.414 that did not include the withdrawn regulations.

The Department's Response:

Based upon section 553(d) of the APA, the Department has concluded that the appropriate effective date for this Final Rule is for investigations initiated 30 days after its

publication.⁵ As explained above and in the Proposed Rule, the Department continues to defend its position that the withdrawal of the targeted dumping regulations in the 2008 Withdrawal Notice was proper. Accordingly, the withdrawn regulations have not been operative since December 10, 2008. However, for purposes of this separate rulemaking, the Department finds that it would not be appropriate to use the effective date of the 2008 interim final rule, nor to waive the 30-day waiting period for the effective date of the final rule. As explained above, the Court of International Trade's decision in *Gold East Paper*, which prompted the Department to conduct this rulemaking, found that the 2008 withdrawal of the regulations was invalid. The Department finds that an effective date which is 30 days after publication of this Final Rule, rather than a retroactive effective date, comports with the APA's requirements and is appropriate.

The Department agrees with one commenter that the 2012 Final Modification promulgated a new regulation in 19 CFR 351.414 (2012) that did not include a portion of the withdrawn targeted dumping regulations. Thus, the Department agrees that following the effective date of the 2012 Final Modification, the withdrawn regulations continued to be non-operative in antidumping proceedings. However, there is not necessarily a link between the procedure implementing the 2012 Final Modification and this rulemaking such that it would be appropriate to use the effective date of the 2012 Final Modification as the effective date of this rulemaking. Therefore, as stated, for purposes of this rulemaking the Department continues to find that an effective date of 30 days after the publication of this Final Rule comports with the APA requirements.

2. Comments Concerning *Gold East Paper Co. v. United States* Litigation

⁵ See 5 USC 553(d).

Several commenters argued that the U.S. Court of International Trade's decision in Gold East Paper, while subject to appeal, invalidates the Department's withdrawal of the targeted dumping regulations, and, thus, the targeted dumping regulations remain in force. For this reason, the commenters claimed that the Proposed Rule to continue not to apply the withdrawn regulations is impermissible.

One commenter stated its view that the Gold East Paper decision was wrongly decided, and will likely be reversed on appeal. Two other commenters noted their recognition of, and support for, the Department's decision to continue to litigate the Court of International Trade's decision in Gold East Paper.

The Department's Response:

As explained in the Proposed Rule, the Department continues to defend its position that the withdrawal of the targeted dumping regulations in the 2008 Withdrawal Notice was proper and that the withdrawn regulations are not operative. However, the Department recognizes that the Court of International Trade ruled in Gold East Paper that there was a procedural defect in the rulemaking process that withdrew the targeted dumping regulations, which prompted the Department to publish the Proposed Rule to seek comment on and clarify the status of the withdrawn regulations.

The Department disagrees that the Proposed Rule is impermissible. The Department's intent in this rulemaking is (1) to clarify the status of the withdrawn targeted dumping regulations as a result of the Court of International Trade's decision in Gold East Paper, which held that the Department did not provide the requisite notice and opportunity to comment pursuant to the APA; and (2) to seek comment on whether to reinstate the regulations or to continue to treat them as withdrawn. The framework of the APA requires that an agency publish

a proposed rulemaking and provide the public notice of the proposal and the opportunity to comment on the proposal.⁶ By publishing the Proposed Rule, providing the public the opportunity to comment on the Department's proposed course of action, and considering the comments raised, the Department has complied with the APA's requirements. The commenters point to no case law or other principles of law to support the assertion that this rulemaking is impermissible. Although the commenter cites to the general notice and comment provisions of the APA, specifically 5 U.S.C. 533(b) and (c), those subsections do not support the argument that this rulemaking is impermissible. Rather, they support the Department's action here, which was to publish a proposed rule and allow the public the opportunity to comment. Thus, the Department disagrees that it has not complied with the requirements of the APA such that this rulemaking is impermissible.

3. Effect of the 2012 Final Modification on this Rulemaking

One commenter argued that because the Department's withdrawal of the targeted dumping regulations is invalid, the regulations remain in force, and do not conflict with the modifications made to 19 CFR 351.414 in the 2012 Final Modification. According to this commenter, 19 CFR 351.414(f) and (g) and 19 CFR 351.301(d)(5) (2007) and the current versions of 19 CFR 351.414 (2012) and 351.301 (2013) may be read harmoniously because the two versions of the regulations are not inconsistent; however, the codification numbering would need to be revised.

Another commenter argued that the 2007 version of the targeted dumping regulations and the 2008 withdrawal of these regulations have no effect on agency determinations (whether investigations or reviews) subject to the 2012 Final Modification because the changes to the

⁶ See 5 U.S.C. 533(b) and (c).

regulations made the 2012 Final Modification supersede the provisions of 19 CFR 351.414(f) and (g) and 19 CFR 351.301(d)(5) (2007). Finally, another commenter contended that even if the “Limiting Rule” had been in place after the 2008 withdrawal of the targeted dumping regulations, it was superseded when the Department did not include the “Limiting Rule” in the 2012 Final Modification, which fully conformed to the APA’s notice and comment requirements.

The Department’s Response:

The 2012 Final Modification was published on February 14, 2012, and applies to all preliminary determinations or preliminary results of review issued after April 16, 2012. The 2012 Final Modification modified the regulations governing the comparison methods applied in less-than-fair-value investigations and reviews under 19 CFR 351.213, 214, 215 and 218, and supersedes prior versions of 19 CFR 351.414. Thus, any such investigation or review with a preliminary determination or preliminary results of review issued after April 16, 2012, is subject to the regulations as modified by the 2012 Final Modification. The rulemaking process which resulted in the 2012 Final Modification was also done in full compliance with the APA.

As noted in the Proposed Rule, the 2012 Final Modification complied with the APA’s notice and comment procedures and provided parties with an opportunity to comment on the Department’s proposed course of action. The 2012 Final Modification, which codified the Department’s changes to 19 CFR 351.414, did not include the previously withdrawn regulations and superseded the prior section 351.414. Further, the Department notes that, although the 2012 Final Modification adopts the average-to-average comparison method as the default method in certain reviews, the Department still may determine that it is appropriate to use an alternative comparison method based upon the facts of a particular segment. As with the withdrawn targeted dumping regulations and the revised 19 CFR 351.414 resulting from the 2012 Final

Modification, the method by which the Department determines whether it is appropriate to use the average-to-average method is not specified except for the requirements provided in section 777A(d)(1)(B) of the Act. Although this provision of the statute specifically references only less-than-fair-value investigations, the Department has found it reasonable to follow the same approach in reviews. The analysis used by the Department to evaluate these requirements depends on the Department's growing experience and further research into the possible approaches to implement section 777A(d)(1)(B) of the Act. The Department's approach to implement section 777A(d)(1)(B) of the Act may continue to evolve as the Department further develops its analysis in this area.

The Department disagrees with one commenter's view that the withdrawn regulation and the 2012 Final Modification can be read harmoniously. As an initial matter, the 2012 Final Modification modified 19 CFR 351.414, the section of the CFR where the withdrawn targeted dumping regulations were originally codified, and the new rule did not include those withdrawn regulations. Second, the withdrawn targeted dumping regulations applied only to less-than-fair-value investigations, not reviews.⁷ Therefore, the withdrawn regulations had no bearing on the Department's conduct in reviews and did not apply in that context. In light of that, if the withdrawn regulations were reinstated, it would create a potentially significant incongruity in the remedy for masked dumping in investigations, as compared to reviews. This is contrary to the aim of the 2012 Final Modification, which was to modify the approach in reviews to parallel, as closely as possible, "the WTO-consistent methodology that the Department applies in original

⁷ See 19 CFR 351.414(f) and (g); 19 CFR 351.301(d)(5) (2007).

investigations.”⁸ Because the Department hereby adopts the approach in the Proposed Rule, it is not reinstating the withdrawn regulations as a modification to 19 CFR 351.414 (2012).

4. Validity of the Department’s Withdrawal of the Targeted Dumping Regulations

Several commenters argued that the withdrawn targeted dumping regulations were based on sound policies, including predictability, transparency and avoiding a punitive methodology, were promulgated with reasoned analysis, and were thoroughly vetted through the APA’s notice and comment requirements. For example, one commenter stressed that the limitation that targeted dumping normally would only be examined when described in an allegation filed by the petitioner no later than 30 days before the date of the preliminary determination in an investigation was based on valid considerations that continue to apply today. These commenters argued that the Department’s withdrawal of the targeted dumping regulations disregarded the well-founded basis for the regulations, and failed to provide reasoned analysis or evidence to support the withdrawal of the regulations. Two commenters argued that the Department’s only attempt at providing reasoned analysis for withdrawing the targeted dumping regulations was the claim that the regulations “may have established thresholds or other criteria that may have prevented the use of this comparison methodology to unmask dumping.” The commenters contended that this claim was speculative and unsupported by evidence. Another commenter argued that the Department must provide a substantive rationale for continuing not to apply the withdrawn regulation.

Two commenters further argued that the Department should continue to apply the withdrawn regulations until it provides a reasoned justification for the withdrawal of the targeted dumping regulations. These commenters argued that the Department has changed its targeted dumping methodology numerous times and is now making such determinations on an ad hoc,

⁸ 2012 Final Modification, 77 FR 8101.

undefined basis that lacks parameters, principles, transparency, and predictability. Further, one commenter observed that the ad hoc application of targeted dumping will result in ceaseless litigation in the courts, and that without general guidelines like those in the withdrawn regulations or a specific methodology, the remedial purpose of the antidumping law has become punitive.

Another commenter argued that the Department may not withdraw the targeted dumping regulations until it properly promulgates a new regulation addressing targeted dumping. This commenter argued that it is improper for the Department to act through adjudication by handling targeted dumping on a case-by-case basis rather than promulgating a regulation which governs all proceedings.

In support of the Proposed Rule, another commenter argued that relying on case-by-case adjudication allows the Department to unmask dumping more effectively, because, for example, under the withdrawn regulations, the Department was limited in its ability to unmask dumping due to the normal practice of limiting the average-to-transaction method to only sales that were found to be targeted, rather than applying the average-to-transaction method to all sales. The commenter stressed that the statute does not require this limitation on the Department's ability to apply the average-to-transaction method to all sales.

Another commenter disagreed, and argues that limiting the average-to-transaction method to only those sales that are found to be targeted is consistent with the statute and avoids applying the methodology in a punitive manner. In addition, the commenter stressed that there is no rational reason for the Department to apply the average-to-transaction comparison method to sales that are not targeted, and that the Department has failed to articulate any such reason. The commenter argued that the Department's concern about masked dumping is alleviated by relying

on the average-to-transaction method without granting offsets for only those sales found to be targeted.

The Department's Response:

The Department believes it provided a reasoned justification for its decision to withdraw the targeted dumping regulations that allowed it to introduce further refinements to its approach to implement section 777A(d)(1)(B) of the Act. As the Department stated in the 2008 Withdrawal Notice, “[t]he Department believes that withdrawal of the provisions will provide the agency with an opportunity to analyze extensively the concept of targeted dumping and develop a meaningful practice in this area as it gains experience in evaluating such allegations.”⁹ Further, the Department observed that the withdrawal of the targeted dumping regulations and case-by-case adjudication would allow the Department “to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.”¹⁰ Moreover, in the Proposed Rule, the Department specifically stated that “in the {2008} Withdrawal Notice, the Department explained that in promulgating the regulations that established criteria for analyzing this issue, it ‘may have established thresholds or other criteria that may have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent.’”¹¹

The Department also disagrees that it has failed to articulate a reason for withdrawing the targeted dumping regulations. In fact, this Final Rule and the Department’s continued non-application of the targeted dumping regulations allows the Department to continue to develop its

⁹ 2008 Withdrawal Notice, 73 FR 74930-31.

¹⁰ *Id.* at 74391.

¹¹ Proposed Rule, 78 FR 60241 (citing 2008 Withdrawal Notice).

approach based upon its experience in implementing section 777A(d)(1)(B) of the Act beyond the confines of the targeted dumping regulations. In the years following the 2008 Withdrawal Notice, the Department did just that by introducing a differential pricing analysis.¹² The Department's experience in developing its practice in recent years since the 2008 withdrawal further underscores the Department's rationale in 2008 that the targeted dumping regulations were preventing the Department from improving its ability to identify and address masked dumping. Furthermore, the Department is able to consider the application of the alternative comparison method and, more specifically, the differential pricing analysis in the context of administrative reviews.

Several commenters seemed to argue that the Department must explain why its preference to exercise its statutory authority on a case-by-case basis is better than doing so under the restrictions of the withdrawn targeted dumping regulations. Such arguments are contrary to judicial precedent, which does not require an agency to explain why a new policy is better than a prior policy.¹³ Given this precedent, the Department need only explain, as it has here, that its approach is permissible under the statute and is reasonable for purposes of exercising its statutory authority on a case-by-case basis in this context.

The Department agrees with one commenter that case-by-case adjudication allows the Department to unmask dumping more effectively, and allows the Department to fully develop its methodology. Further, this case-by-case adjudication has allowed the Department to develop the

¹² See, e.g., Xanthan Gum from China; Xanthan Gum from Austria (post-preliminary determination analysis memos).

¹³ See *Mid Continent Nail Corp. v. United States*, Slip. Op. 2010-48 (Ct. Int'l Trade May 4, 2010) 2010 Ct. Int'l Trade LEXIS 48, *23-24 (2010) (Mid Continent Nail) (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates"))).

newly-introduced differential pricing analysis which itself may be further modified given the specific evidence presented in a particular investigation or review. The Department's position is that the determination of which comparison method to apply is highly dependent upon the facts of the individual proceeding, but in all administrative proceedings, interested parties will have the opportunity to comment on whether an alternative comparison method is warranted.

With respect to comments that the withdrawn targeted dumping regulations were based on sound policies that remain applicable to the calculation methodology today, the Department disagrees that refinements to its methodology invalidate previously applied analysis methods. As discussed above, the Department has explained (1) that there are good reasons for the application of the revised approach, (2) why it believes that the revised approach is better, and (3) that the revised approach is permissible under the law. The Department also finds that it has not disregarded the targeted dumping analysis, or any of its predecessors, and that it reasonably revised its analysis to fulfill its obligation when implementing section 777A(d)(1)(B) of the Act. The Department further notes that it will continue to develop and refine its implementation of section 777A(d)(1)(B) of the Act, as warranted.

The Department disagrees that its approach in this respect is unpredictable and biased because it is not based upon basic guidelines or principles. Rather, withdrawing the unnecessarily restrictive targeted dumping regulations has permitted the Department to refine its methodology and continue to develop its analysis based on experience. In doing so, the Department has refined its analysis in recent years based on its growing experience in implementing section 777A(d)(1)(B) of the Act. When applying an alternative comparison method in a particular case, the Department has explained the developments in its analysis. Last year, the Department introduced a differential pricing analysis to determine whether use of an

alternative comparison method is appropriate.¹⁴ In *Xanthan Gum from China*, the Department explained that “it continues to develop its approach pursuant to its authority to address potential masked dumping.”¹⁵ In proceedings in which the Department applied either the targeted dumping analysis or the differential pricing analysis, the Department provided parties the opportunity to comment on the Department’s analyses.¹⁶ Thus, contrary to some commenters’ claims, the Department’s practice has not been unpredictable, but rather has been consistent and transparent.

With respect to the commenters’ arguments regarding the application of the average-to-transaction method to all U.S. sales rather than a subset of sales, the Department notes that the statute, for less-than-fair-value investigations, is silent on whether the alternative comparison method applies to all sales or to only a subset of sales.¹⁷ Congress could have explicitly granted the Department certain authority in this context, but it chose to leave such a determination to the Department’s discretion. Thus, the statute provides that the Department may employ an alternative comparison method when two criteria are satisfied, but does not dictate whether to apply that method to all sales or only to a subset of sales. When the Department withdrew the targeted dumping regulations in the 2008 Withdrawal Notice, it explained that “withdrawal of the provisions will provide the agency with an opportunity to analyze extensively the concept of targeted dumping and develop a meaningful practice in this area as it gains experience in

¹⁴ See *Xanthan Gum from China*.

¹⁵ *Id.* at Comment 3.

¹⁶ See, e.g., *Nails from China*, and accompanying issues and decision memorandum at Comments. 1-8; *Xanthan Gum from China*, at Comment 3.

¹⁷ See Section 777A(d)(1)(B) of the Act.

evaluating such allegations.”¹⁸ Since 2008, the Department has continued to develop its practice based on its case-by-case experience and, as a result of parties’ comments in those proceedings, it has revised its approach in a reasoned and purposeful manner. Although not required by statute, the Department’s recently employed differential pricing analysis considers the proportion of a respondent’s sales that are part of a pattern of prices that differ significantly when determining whether to use an alternative comparison method based on applying the average-to-transaction method to all U.S. sales or only to a subset of U.S. sales.¹⁹ In *Xanthan Gum from China*, the Department explained that in the differential pricing analysis “there is a direct correlation between the U.S. sales that establish a pattern of export prices that differ significantly and to what portion of the U.S. sales the average-to-transaction method is applied.”²⁰ Thus, in developing its practice following the 2008 Withdrawal Notice, the Department has analyzed application of the average-to-transaction method and applies the remedy in a reasonable fashion based upon the facts on the record of a particular investigation or review.

5. Application of the Targeted Dumping Analysis

Several commenters observed that targeted dumping is a reflection of normal commercial practices, and argue that the Department’s refusal to consider legitimate commercial reasons for targeting is contrary to congressional intent, judicial precedent and administrative practice. Two commenters add that the Department’s application of the average-to-transaction method, without considering company-specific factors or reasons why prices may differ, ignores the express

¹⁸ Withdrawal Notice at 74930-31.

¹⁹ See *Xanthan Gum from China*, at Comment 3.

²⁰ *Id.*

requirement in the Statement of Administrative Action (SAA) to proceed on a case-by-case basis, in light of differences in significance based on industry or type of product.

Two commenters argue that the Department should reinstate the withdrawn targeted dumping regulations, including the “normal rules” that the average-to-transaction method applies only to sales that have been found to be targeted. The two commenters advocate reinstatement of the withdrawn regulations, but with added provisions that: (i) an affirmative finding of targeted dumping requires that the targeted sales actually be sold at dumped prices; (ii) the Department will consider all relevant facts and circumstances in determining whether dumped sales are targeted, including reasons for disparities in sale prices by purchaser, region or time period in light of normal commercial practices; and (iii) the average-to-transaction method should not apply if targeted sales are de minimis. These two commenters argue that a revised regulation that includes these additional provisions should be effective for all reviews and investigations whose results are not final, including segments of proceedings in which parties have challenged the Department’s withdrawal of 19 CFR 351.414(f) (2007) in court, and should be implemented through the issuance of a Policy Bulletin and Proposed Regulations, with opportunity for comment. One commenter also argued that the Department should modify its use of the Cohen’s d test, as employed in the differential pricing analysis, to conform to the commenter’s proposed changes to include regulatory provisions on targeted dumping.

According to another commenter, targeted dumping is an unproven theoretical construct that cannot be proven through statistically valid techniques, and there is no evidence that targeted dumping is a “problem” that needs to be unmasked. The commenter argues that the real difficulty is that sale prices may differ by purchaser, region or time period as a result of normal commercial practices. Further, the commenter contends that a pattern of prices that differ

“significantly” would occur in extraordinary circumstances, and targeted dumping as defined by the statute is not a usual or frequent occurrence.

The Department’s Response:

As explained above, the Department has decided not to reinstate the previously withdrawn targeted dumping regulations or to promulgate revised regulations to implement 777A(d)(1)(B) of the Act. The Department explained that it withdrew the targeted dumping regulations in order to broaden its experience and consider potential approaches to fully address this issue. As a result of this increased experience and further research, the Department has developed and employed a differential pricing analysis to consider whether the average-to-average method applied to all U.S. sales is an appropriate tool to determine the amount of dumping, if any, for a given respondent. In the differential pricing analysis, the Department considers, based upon the facts on the record, whether it is appropriate to apply the average-to-transaction method to a portion, all, or none of a respondent’s U.S. sales as an alternative comparison method to applying the average-to-average method to all U.S. sales.²¹ As noted above, the Department will continue to refine its approach in implementing section 777A(d)(1)(B) of the Act as it gains additional experience in its application of section 777A(d) of the Act and CFR 351.414 (2012). Further, the Department disagrees with the substance of the suggested modifications summarized above, whether codified in regulations or as part of the Department’s practice. The Department disagrees that targeted sales, or sales which have been found to constitute a pattern of prices that differ significantly, must be sold at dumped prices. Section 777A(d)(1)(B)(i) refers to a pattern of export prices or constructed export prices and does not consider a comparison of such prices with normal values, and, therefore, there is no

²¹ See Xanthan Gum from China, and accompanying Issues and Decision Memorandum at Comment 3.

requirement that the sales which comprise such a pattern be dumped or not dumped. Indeed, all, some or none of the U.S. sales which are found to create a pattern of prices that differ significantly may be below their comparable normal value, but this is immaterial when addressing section 777A(d)(1)(B)(i) of the Act. Accordingly, a determination of “dumping” is not encompassed within the analysis that establishes whether a pattern of prices that differ significantly exists.

The Department also disagrees that it must consider a party’s explanations of their pricing behavior as part of the Department’s analysis when determining whether to employ an alternative comparison method. As explained in past cases, the Department does not consider “why” there exists a pattern of prices that differ significantly. The statute provides that the Department may apply an alternative comparison method if “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time” and the Department explains why those differences cannot be taken into account using the normal method.²² The statute does not, however, direct the Department to consider the reason for the price differences or the motivations behind the respondent’s pricing behavior. Rather, it provides that when there is a pattern of prices that differ significantly and the average-to-average method cannot account for such differences, then the Department may find that the average-to-average method is not the appropriate tool to determine the extent of a respondent’s dumping and may apply an alternative comparison method. In recent determinations, the Department has declined to find that a party’s explanation of its pricing justifies the presence of targeted sales.²³

²² Section 777A(d)(1)(B) of the Act.

²³ See, e.g., Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less than Fair Value, 77 FR. 17029 (Mar. 23, 2012), and the accompanying Issues and Decision Memorandum at Comment 1;

The Department believes that a determination whether to apply an alternative comparison method is best made on a case-by-case basis, rather than applying a rigid de minimis test. In recent cases, as the commenters acknowledge, the Department has considered the extent of the targeting when determining whether to apply the alternative comparison method.²⁴ However, as previously explained, the withdrawal of the targeted dumping regulations allows the Department the necessary flexibility to develop its practice in this area. Indeed, when applying a differential pricing analysis, the Department takes into account the percentage of sales passing the Cohen's d test in determining whether to apply the alternative comparison method.²⁵

Further, the Department disagrees that there is no evidence that targeted or masked dumping is a "problem" that needs to be addressed. The Federal Circuit agreed with the Department that Congress, in the statute, specifically provides for the use of an alternative comparison method when certain prerequisite conditions are met in order for the Department to implement section 777A(d)(1)(B) of the Act.²⁶ The Department believes that Congress's explicit provision in the statute for the use of an alternative comparison method in situations where certain facts are present demonstrates that the Department may consider whether and to what extent hidden or masked dumping exists and how best to address it.

Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (Dec. 6, 2012) and the accompanying Issues and Decision Memorandum at Comment 1-C; Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 79662 (Dec. 31, 2013), and the accompanying Issues and Decision Memorandum at Comment 5.

²⁴ See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Review; 2010-2011, 78 FR 9670 (Feb. 11, 2013); Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Review; 2010-2011, 77 FR 73415 (Dec. 10, 2012).

²⁵ See Xanthan Gum from China, at Comment 3.

²⁶ *United States Steel Corp. v. United States*, 621 F.3d 1351, 1363 (Fed. Cir. 2010) ("[T]he exception contained in 1677f-1(d)(1)(B) indicates that Congress gave {the Department} a tool for combating targeted or masked dumping by allowing {the Department} to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time.")

6. Application of the Average-to-Transaction Method

With respect to the withdrawn regulations' provision that the average-to-transaction method will be applied only to those sales found to be targeted, one commenter argues that if the Department determines to apply the withdrawn regulations in proceedings completed prior to the effective date of this Final Rule, it should do so consistent with how it applied the regulations prior to their withdrawal (and consistent with its approach in the differential pricing methodology), i.e. not offset dumping margins found for targeted sales with non-dumped sales which were not targeted. The commenter further argues that if the specifics of the case at hand require, the Department should not apply the average-to-transaction method to only targeted sales where targeting is extensive or widespread, but instead should apply the average-to-transaction comparison method to all sales.

Another commenter argues that the withdrawn regulations remain valid, in particular because applying the average-to-transaction method to all sales would be punitive given that offsets would be denied for all non-dumped sales. Two other commenters also argue that the Department's targeted dumping analysis effectively negates the Department's abandonment of denying offsets for non-dumped sales because, upon finding that targeted dumping has occurred, the Department applies the average-to-transaction method to all sales, including those that are not targeted. According to these two commenters, the effect is that offsets are denied for all non-dumped sales.

The Department's Response:

As noted above, the Department continues to find that the targeted dumping regulations, including 19 CFR 351.414(f)(2) (2007), the "Limiting Rule", are inoperative. Under the Limiting Rule, the Department applied the average-to-transaction method to only those U.S.

sales which were found to have been targeted. However, the Department believed that this did not adequately address the masked dumping presented by the results of the Nails test, as employed in the targeted dumping analysis. First, the Nails test only identified lower-priced sales to certain purchasers, regions or time periods specified in the petitioner's targeted dumping allegation. Pursuant to section 777A(d)(1)(B)(i) of the Act, a pattern of prices that differ significantly is determined not only by considering lower priced sales but by comparison of those sales to other, higher priced sales. Therefore, the Department was not identifying all of the U.S. sales that constitute a pattern of prices that differ significantly. Without identifying all the sales that form the pattern, and by limiting the remedy to only those particular sales, the Department recognized that the remedy for addressing the scenario contemplated in section 777A(d)(1)(B) of the Act could be inadequate.

As a result, the Department withdrew the regulations governing targeted dumping, as described above and in the 2008 Withdrawal Notice, to allow it greater ability to develop more effective methods to implement section 777A(d)(1)(B) of the Act. Initially, this involved the targeted dumping analysis with the average-to-transaction method being applied to all U.S. sales but with added discretion as to whether this alternative comparison method was warranted.²⁷ Subsequently, with the Department's publication of the 2012 Final Modification, the Department's approach in less-than-fair-value investigations began to be applied in administrative reviews.²⁸ With the Department's growing experience in addressing the criteria set forth in section 777A(d)(1)(B) of the Act, the Department introduced a differential pricing analysis in Xanthan Gum from China. In this approach, the potential alternative comparison

²⁷ See *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (Mar. 23, 2012).

²⁸ See 2012 Final Modification; *Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Review*; 2010-2011, 77 FR 73415 (Dec. 10, 2012).

method is determined according to the extent of the pattern of prices that differ significantly, and may include applying the average-to-transaction method to all, some, or none of the U.S. sales, depending upon the facts in each case.

The Department disagrees with the argument that the application of the average-to-transaction method to all U.S. sales is punitive. The purpose of considering whether to apply an alternative comparison method is to determine whether the average-to-average method is an appropriate tool to measure the amount of dumping of a respondent. When the Department determines that an alternative comparison method is appropriate, it is based on a reasonable analysis supported by evidence on the record of the particular segment of the proceeding and is in accordance with the statute, regulations, and Congressional intent to implement section 777A(d)(1)(B) of the Act, where appropriate. Therefore, a determination to apply a particular comparison method to calculate a respondent's weighted-average dumping margin is not punitive, but rather a reflection of the respondent's own pricing behavior.

The Department disagrees that the application of the average-to-transaction method negates the Department's abandonment of denying offsets for non-dumped sales in investigations or reviews. In 2006, the Department came into compliance with certain WTO rulings and changed its practice to grant offsets for non-dumped comparison results when using the average-to-average method in less-than-fair-value investigations.²⁹ With the 2012 Final Modification, the Department changed its practice in certain types of reviews, including administrative reviews, to follow its WTO-compliant practice in less-than-fair-value investigations and to use the average-to-average method while granting offsets for non-dumped comparison results. The Department has not changed its approach with respect to the application

²⁹ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006).

of the average-to-transaction method, which includes the denial of offsets for non-dumped sales when aggregating the transaction-specific comparison results. This is based on the fundamental differences between the average-to-average method and the average-to-transaction method and has been upheld by the Federal Circuit.³⁰

7. Other Comments

Two commenters raise concerns with the Department's current approach, in particular the Department's use of the Cohen's d test. Specifically, these commenters contend that the Cohen's d test is not a recognized statistical measure for identifying targeted sales, and fails to account for directionality, i.e. it does not distinguish between positive and negative results. As a result, the test wrongly captures sales that are not targeted. Instead, these commenters argue that a pooled standard deviation should be based on a weighted average, rather than simple average variances, and the Department should control for more independent variables in each run, as well as apply additional filters before determining targeted sales.

The Department's Response:

In the Proposed Rule, the Department advised that it was "seeking comments from parties to clarify the status of the previously withdrawn regulatory provisions with regard to antidumping duty investigations," and also invited comment on the effect of the Proposed Rule on recent modifications to the Department's methodology, i.e., the 2012 Final Modification.³¹ The Department further explained that it was inviting parties "to comment on this proposed rulemaking and the proposed effective date. Further, any party may submit comments expressing its disagreement with the Department's proposal and may propose an alternative

³⁰ *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013).

³¹ Proposed Rule, at 60240.

approach. If any party believes that the Department should reinstate the previously withdrawn regulations, that party should explain how to reinstate the withdrawn regulations and include suggestions on how to codify such reinstatement, as well as any suggestions on the effective date.”³²

The comments submitted with respect to the characteristics and application of the Cohen’s d test are beyond the scope of the rulemaking, i.e., the Proposed Rule, and therefore, the Department need not reach consideration of these comments. The Department expects to request comments from parties on its current differential pricing analysis separately.

Classification

Executive Order 12866

This rulemaking is not significant for purposes of Executive Order 12866 of September 30, 1993 (“Regulatory Planning and Review”) (58 FR 51735 (October 4, 1993)).

Paperwork Reduction Act

This proposed rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Executive Order 13132

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

Regulatory Flexibility Act

³² *Id.* at 60241.

The Chief Counsel for Regulation certified to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”) at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small business entities under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b). For this reason, a Final Regulatory Flexibility Analysis is not required and one has not been prepared.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

April 7, 2014
(Date)

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